CORPORATE LAWS

Case Law Update

Makarand Joshi,
Company Secretary

1. SEBI

Ruling of Adjudicating Officer – SEBI

Name of the Case: In respect of Mr Neeraj Agarwal ("Noticee 1") and Ms Shruti Vora ("Noticee 2") in the matter of circulation of unpublished price sensitive information (UPSI) through whats app messages with respect to Ambuja Cements Ltd.

Facts of The case

1. During November 2017, there were certain articles published in newspapers / print media referring to the circulation of Unpublished Price Sensitive Information (hereinafter referred to as "UPSI") in various private WhatsApp groups about certain companies ahead of their official announcements to the respective Stock Exchanges.

2. Preliminary examination in the matter of circulation of UPSI through WhatsApp groups during which search and seizure operation for 26 entities of Market Chatter WhatsApp Group were conducted and approximately 190 devices, records etc., were seized. The WhatsApp chats extracted from the seized devices were examined further and while examining the chats, it was found that in respect of around 12 companies whose earnings data and other financial information got leaked in WhatsApp. Out of the 12 companies, Ambuja Cements Ltd., was one among the company, whose quarterly financial results for the 3rd quarter of financial year 2016-17 closely matched with the messages circulated in WhatsApp chats.

3. SEBI carried out an investigation in the matter of circulation of UPSI through WhatsApp messages with respect to Ambuja Cements Ltd., to ascertain any possible violation of the provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act") and SEBI (Prohibition of Insider Trading) Regulations, 2015 (hereinafter referred to as " SEBI (PIT) Regulations") during the period January 01, 2017 and February 20, 2017 (hereinafter referred to as "Investigation Period").

4. It was observed that the financial figures of Ambuja Cements Ltd for quarter ended December 2016, were communicated through WhatsApp prior to their announcement to the stock exchanges. Financial figures included viz., Revenue and PAT (Profit after tax)

5. The details of communication of WhatsApp message related to Ambuja Cements Ltd., ("ambuja rev 2233ebitda 329 pat 176 ebitda per tonn 650") as observed from the WhatsApp Chat retrieved from Ms. Shruti Vora's device are tabulated hereunder (Apple iPhone 6s, IMEI: 35576073570777):

Entity from whom Shruti Vora received the message	Date and Time of receipt of message by Shruti Vora	Entities to whom Shruti Vora forwarded the message	Date and Time of forwarding of message by Shruti Vora
Neeraj Agarwal 9004089401	20/02/2017 12:50:03	Summet Hinduja 9819227915	20/02/2017 13:26:35
		Sumit Kumar 9820808438	20/02/2017 13:26:35
Mobile No. Ms. Shruti Vora: 9820832032			

6. It was observed that the financial figures of Ambuja Cements Ltd., (viz., Revenue and PAT) circulated through WhatsApp closely matched with those disclosed subsequently by Ambuja Cements Ltd. on stock exchanges (deviation in financial figures was within a range of 0.07% to 0.09%). Hence, the aforesaid message related to Ambuja Cements Ltd., would fall under UPSI and such circulation of financial figures through WhatsApp has been considered as communication of UPSI.

Charges levied

It was alleged that the Noticees being insiders had communicated the UPSI relating to Ambuja Cements Ltd., viz., total income, EBITDA and PAT for the quarter ended December 2016 to other person(s) through WhatsApp messages, which is prohibited and is in violation of the provisions of Section 12 A (d) & 12 A (e) of the SEBI Act, 1992 and Regulation 3 (1) of PIT Regulations, 2015.

Arguments made by Appellant/Noticees

1. ***The information that was shared through Whats App did not match with that of the subsequently announced financial results of Ambuja Cements:*** Noticee 1 argued that contents on whats app messages and actual results were different. Whats app message forwarded was an estimate and expectation and not actual UPSI as alleged. WhatsApp message contained expectations on financials for quarter ending 31.12.2016 alone (i.e. expectation of 1 set) and not about expectations of 3 sets of results. Expectations on financials about 1 quarter contained in the WhatsApp message and that announced by Ambuja Cement also differ and there is no allegation that the data contained in the WhatsApp message lead to any increase in price or volume.

2. ***The information shared was of the nature – "Heard on Street" (HOS) and not UPSI:*** Noticee 2 stated that SEBI PIT Regulations prohibit sharing of price sensitive information which has not been published i.e. something accurate, certain or based on facts. An analysis of the messages on WhatsApp would reveal HOS was sent and clearly understood as market gossip and the same cannot be treated as "information". Admittedly, there was no source-based credibility to any of such HOS.

3. ***No breach of law established:*** Noticee 2 stated that Show Cause Notice ('SCN'), on a plain reading, does not establish any breach of law / rules / regulations and merely makes a bald allegation. The SCN is contrary to the SEBI PIT Regulations, that mandate SEBI to prove that I had access to UPSI.

Arguments made by SEBI

1. ***The information that was shared through WhatsApp matched with that of the subsequently announced financial results of Ambuja Cements:*** All the details mentioned in the Noticees' WhatsApp message dated February 20, 2017 accurately matched with that of the subsequently announced financial results of Ambuja Cements. SEBI also found it very pertinent to note that the information relating to financial results that included Income and PAT were not even stated in any approximate range of values but were stated as a definite amount in the messages which accurately matched with that of the subsequently announced results. Accordingly SEBI observed that the information forming part of the circulated WhatsApp messages by the Noticees was exactly same as that of the subsequently announced financial results.

2. ***The information shared was of the nature – "Heard on Street" (HOS) and not UPSI:*** SEBI noted that admittedly there have been several communications which happened frequently with respect to the financial results of the companies between the personals who are closely associated with the market. The Noticees in all probability must have observed that some of the information they received had very closely matched with the subsequently announced financial results. Especially considering that they were not aware of the source of the UPSI that they had received, it was to alarm the Noticees or give raise to a suspicion on the source of the information. Surprisingly, it has not been the case and the Noticees had chosen to accept the information and further communicate the same ignoring the material nature of the information. Considering the extent of significance SEBI stated that a lenient view cannot be warranted so as to consider such information qualifying to be an UPSI as a mere HOS.

3. ***No breach of law on the part of notices:*** Three questions needs to be answered in this.

   (a) Whether the information constituted UPSI?

   Information included the exact details with respect to crucial part of financial results such as total income and PAT, which turned to be accurate. Fact cannot be ignored that such information relating to results was being circulated between the closed groups of entities including the Noticees through the WhatsApp messages and the general public had no knowledge of such information. This circulation of messages by its very nature makes it a discriminatory access to the selected few. Therefore the information in this case fails the test to be called generally available information as contended by the Noticees. Messages about the financial results were circulated prior to the official announcement made by the Companies hence they are considered as UPSI.

   (b) Whether the notices were insiders within the definition of Reg 2(1)(g) of PIT Regulations 2015?

   Once information is established to be a UPSI, anybody who is in possession

of such information will be an insider. The legislative note to Reg 2(1)(g) of PIT Regulations 2015 also clarifies the legislative intent of the said provision by stating that a person is to be considered an insider regardless of how the UPSI has come into his/her possession.

(c) Whether the noticees being the Insiders further communicated the UPSI?

Noticees being the insiders for having the UPSI in their possession of February 20, 2017 had forwarded such UPSI through WhatsApp messages i.e. Noticee 1 to Noticee 2 and further Noticee 2 to two persons. In view of the same there is no reasonable doubt in concluding the Noticees as insiders under the provisions of Regulation 2(1)(g) of SEBI (PIT) Regulations who were under the possession of UPSI and communicated the same further.

Held

Under Section 15G of SEBI Act 1992 penalty of ₹ 15,00,000/- levied on each of the noticees for the violation of Sections 12 A (d) & 12 A (e) of the Securities and Exchange Board of India Act, 1992 and Regulation 3 (1) of SEBI (Prohibition of Insider Trading) Regulations, 2015.

2. IBC

State Bank of India (Appellant) vs. Metenere Ltd (Respondent) in the order passed by the National Company Law Appellant Tribunal (NCLAT) dated 4 January, 2020

Facts of the case

- State Bank of India (SBI) filed an application for initiation of Corporate Insolvency Resolution Process(CIRP) with the National Company Law Tribunal (NCLT) under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code), as a financial creditor of M/s. Metenere Ltd. (Corporate Debtor).
- In the said application, SBI proposed an ex-employee who was also drawing pension from SBI - to be appointed as the Interim Resolution Professional (IRP).
- The Corporate Debtor objected appointment of an ex-employee as the IRP on the apprehension of being bias and unlikely to act fairly and could not be expected to act as an Independent Umpire.
- NCLT agreeing with claims of the corporate debtor, passed an order directing the financial creditor to substitute existing IRP with different IRP.
- Aggrieved by the order of the NCLT, the financial creditor approached NCLAT seeking to set aside impugned order.

Arguments by the Appellant

- It was contended that Code and regulations framed thereunder did not attract any disqualification to an ex-employee of a financial creditor from being appointed as an IRP
- SBI further asserted that a Resolution Professional (RP) had no adjudicatory powers and would only act as a facilitator in the CIRP as all major decisions are taken only with the approval of the 'Committee of Creditors'.
- It was also claimed that IRP was not required to act as an 'Independent Umpire' between financial creditor and ex-management of the Corporate Debtor or decide any conflicting issues between them. It was also stated that merely because the proposed IRP happens to be an ex-employee of the 'financial creditor' could not be a ground to be alleged for being biased.

Arguments by the Respondent

- Respondent stated that proposed IRP was drawing pension from the financial creditor which fell within the definition of 'salary' under the Income Tax Act, 1962 and was thus an 'interested person', who thereby became ineligible to act as an IRP.
- Mere apprehension of being biased was sufficient ground of apprehension of biasness of the proposed IRP towards the financial creditor.

Held

- NCLAT pointed out that regulation 3(1) of the Insolvency and Bankruptcy Board of India (Insolvency of Corporate Persons) Regulations, 2016 provides that RP should be independent of the Corporate Debtor. The explanation to the regulation also provides for certain disqualification/ ineligibility to act as RP. It states that a person shall be considered independent of the Corporate Debtor if such person is eligible to be appointed as Independent Director on the Board of the Corporate Debtor. The above said regulation makes it clear that the RP should in no way, whether directly or indirectly, be related to Corporate Debtor and that any such nexus will act as a disqualification for RP to act as IRP/RP in that particular case.
- Further, the NCLAT highlighted the fact that bringing pension within the ambit of 'salary' cannot be interpreted to render a pensioner of a 'Financial Creditor' under the statutory framework ineligible as an 'interested person' being in employment of the 'Financial Creditor' as the definition of 'salary' under the Income Tax Act, 1961 is designed only for the purposes of computing of income to determine tax liability
- NCLAT also observed that no disciplinary proceedings are pending against IRP and he is not o engaged as a retainer by the financial creditor placing reliance on "State Bank of India vs. Ram Dev International Ltd"
- Further a fact that the proposed IRP is drawing pension from the financial creditor doesn't clothe him with the status of an employee on the payroll of financial creditor.
- It was noted that IRP had a long association with the appellant and is drawing pension coupled with the fact that the 'IRP' is assigned duties as provided in section 18 of the code. To act as an Independent Umpire – it must be understood in the context of the 'IRP' acting fairly qua the discharge of his statutory duties irrespective of the fact that he is not competent to admit or reject a claim
- NCLAT while agreeing that there was no disqualification or ineligibility towards the proposed IRP to act as an IRP, however, concluded that apprehensions of being biased cannot be dismissed and hence upheld the order of NCLT.

❍□❍